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Before the  
Federal Communications Commission  
Washington, DC 20554

NOV 13 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

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Petition of WorldCom, Inc.  
Pursuant to Section 252(e)(5) of the  
Communications Act for Expedited  
Preemption of the Jurisdiction of the  
Virginia State Corporation Commission  
Regarding Interconnection Disputes  
with Verizon-Virginia, Inc. And for  
Expeditious Arbitration

CC Docket No. 00-218

COMMENTS OF AT&T CORP.

Pursuant to Section 1.415 of the Commission's Rules and its Public Notice, DA 00-2432, released October 27, 2000, AT&T Corp. ("AT&T") respectfully submits these comments on the petition ("Petition") of WorldCom, Inc. ("WorldCom") for an order preempting the jurisdiction of the Virginia State Corporation Commission ("VSCC") to arbitrate an interconnection agreement for Virginia between WorldCom and Verizon ("Verizon") under Section 252 of the Telecommunications Act of 1996 ("the Act").

The facts set forth in the Petition demonstrate beyond peradventure that the VSCC has "fail[ed] to act to carry out its responsibilities" within the meaning of Section 252(e)(5) of the Act, and that the Commission must therefore assume the privileges and duties conditionally granted to the VSCC by Congress with regard to the requested interconnection agreement. Moreover, the material facts that give rise to WorldCom's Petition apply equally to other competitive local exchange carriers

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(“CLECs”) whose interconnection agreements for Virginia have either expired or are about to expire, and who seek to enter into replacement agreements with Bell Atlantic. Accordingly, to protect the interests of such other CLECs as well as WorldCom, and conserve Commission resources, AT&T urges the Commission to consider following the example of the Texas Public Utilities Commission (“TPUC”) by conducting a “Mega-arbitration” or similar proceeding that would allow other CLECs to participate in the arbitration proceeding with the same rights as WorldCom.

I. **BY DECLINING TO ARBITRATE AND APPROVE INTERCONNECTION AGREEMENTS IN ACCORDANCE WITH SECTIONS 251 AND 252, THE VSCC HAS FAILED TO ACT, REQUIRING THE COMMISSION TO PREEMPT ITS JURISDICTION AND ASSUME ITS RESPONSIBILITIES**

Recent orders of the VSCC make clear that it has not and will not act to resolve disputes over, and approve, interconnection agreements in accordance with federal law. When read against the relevant provisions of the Act, these orders establish that the Commission must assume jurisdiction over these proceedings under Section 252(e)(5), as explained below.

Sections 251 and 252 of the Act grant to CLECs such as WorldCom and AT&T the right, *inter alia*, to interconnect with and purchase at cost-based rates elements of the incumbent LECs’ networks. Congress recognized, in light of the disparity in their bargaining power, that CLECs and ILECs would be unable to agree on many of the terms and conditions governing these arrangements. Congress therefore established a process by which the parties could have their disputes resolved in accordance with the substantive provisions of Sections 251 and 252, including the Commission’s implementing regulations. In Section 252(b), Congress granted to state

public utilities commissions the authority to resolve such disputes through arbitration proceedings. In Section 252(e), Congress authorized PUCs to approve interconnection agreements between the parties reflecting the resolutions reached in the arbitration. Congress required that, in acting upon these authorizations, the PUCs ensure that their decisions comply with the substantive provisions of Section 251 and 252(d), including Commission regulations. See Sections 252(c) and (e)(2)(B). In Sections 252(e)(4) and (6), Congress granted to the federal courts exclusive jurisdiction to review the resulting interconnection agreements for compliance with these provisions and regulations.

Congress also anticipated that some PUCs could not or would not exercise the authority that it had granted to them. It therefore enacted Section 252(e)(5), which provides as follows:

“(5) COMMISSION TO ACT IF STATE WILL NOT ACT. – If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.”

The elements of Section 252(e) clearly are present in Virginia. As reflected in four separate orders, the VSCC does not wish or intend to be subject to federal jurisdiction in judicial actions to review interconnection agreements for compliance with the substantive provisions of Sections 251 and 252(d), and asserts that

Virginia law forbids it from submitting itself to such jurisdiction.<sup>1</sup> According to the VSCC:

“The [VSCC] had maintained and continues to maintain that in taking its actions on these [interconnection] agreements the Commonwealth of Virginia is protected from federal suit by the Eleventh Amendment to the U.S. Constitution. . . . The Commission has no authority to waive the Commonwealth’s sovereign immunity. . . . Therefore, we will not take any action in this matter that may subject the Commonwealth to federal suit.”<sup>2</sup>

In an unbroken line of decisions, including that rendered in connection with an arbitration petition by WorldCom, the VSCC has therefore made it clear that it will not “carry out its responsibilit[ies] under [Section 252]” to arbitrate disputes and approve interconnection agreements in accordance with federal law. Instead, the VSCC has given the parties a choice: either arbitrate before the VSCC in a proceeding that will be governed exclusively by state law, or “take the petition for arbitration under the Act to the Federal Communications Commission.”<sup>3</sup>

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<sup>1</sup> Cox Virginia Telcom, Inc. v. Verizon Virginia, Inc., case no. PUC000212, Order of Dismissal, Nov. 1, 2000 (“Cox”); Petition of MCI WorldCom Communications of Virginia, Inc., case no. PUC000225, Order, Sept. 13, 2000 (“MCI WorldCom”); Petition of Focal Communications Corp. of Virginia, case no. PUC00079, Final Order, Aug. 22, 2000; Petition of Cavalier Telephone, LLC, case no. PUC990191, Order, June 15, 2000 (“Cavalier”). For the Commission’s convenience, copies of these four VSCC orders are attached hereto.

<sup>2</sup> Cavalier, at 7.

<sup>3</sup> Cox, at 3; WorldCom, at 3 (“the parties may elect to proceed with WorldCom’s arbitration under the Act before the FCC in lieu of this Commission, or the parties may pursue resolution of unresolved issues pursuant to [state law]. If WorldCom wishes to pursue this matter before the Commission, the proceeding before us will be deemed to be requesting our action only under authority of Virginia law and our Rules.”)

In these circumstances, the Commission has the authority – indeed, the duty – to (i) find that the VSCC has chosen not to act to arbitrate and approve interconnection agreements under Section 252, (ii) preempt the jurisdiction of the VSCC, and (iii) assume the responsibilities of and act for the VSCC in arbitrating and approving interconnection agreements in accordance with the substantive provisions of Sections 251 and 252(d) and Commission regulations.

II. THE COMMISSION SHOULD CONDUCT A “MEGA-ARBITRATION”  
LARGELY, BUT NOT ENTIRELY, IN ACCORDANCE WITH THE  
PROCEDURES PROPOSED BY WORLDCOM

In addition to requesting an order preempting the jurisdiction and assuming the responsibilities of the VSCC, WorldCom’s Petition requests the Commission to adopt at least some of the rules and procedures that would govern proceedings subsequent to issuance of the preemption order. AT&T has no objection to the adoption of such procedures at this time, and for the most part, generally endorses those proposed by WorldCom.<sup>4</sup> But some of WorldCom’s proposals raise questions.

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<sup>4</sup> AT&T endorses WorldCom’s proposals that (1) the Commission’s arbitration process allow for pre-filed testimony, informal hearings that would include live cross-examination, and post-hearing briefing; (2) the arbitrator be permitted to direct the parties to file proposed contract language on disputed issues; and (3) the parties file their exceptions to rulings of and contract language proposed by the arbitrator, upon which exceptions the Commission shall rule. AT&T also agrees with WorldCom’s proposal (p. 12) governing the process for producing and then approving an interconnection agreement that conforms to the final arbitration decision, except perhaps for the suggested time frames. Finally, AT&T endorses WorldCom’s proposal (pp. 12-13) that the arbitration panel be comprised of one representative each from the staffs of the Common Carrier Bureau, Office of Engineering and Technology, and Office of Plans and Policy.

Most fundamentally, the Petition (p. 9) appears to assume that party status to the arbitration proceeding will be limited to WorldCom and Verizon, with the participation of all other interested persons limited to the filing of “amicus briefs.”

AT&T believes that any such limitation would not protect the interests of other parties who, like AT&T, have exercised their statutory right to request the VSCC to arbitrate their interconnection agreement disputes with Verizon pursuant to federal law, and have advised the VSCC that they do not or will not accept its offer to resolve such disputes solely in accordance with state law.<sup>5</sup>

Unless the Commission conducts individual and essentially simultaneous arbitration proceedings between Verizon on the one hand, and WorldCom, AT&T and any other similarly situated CLEC (as described above), the only way to protect the interests of all parties would be for the Commission to conduct a proceeding similar to the “Mega-Arbitrations” conducted by the TPUC.<sup>6</sup> In such a proceeding, WorldCom,

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<sup>5</sup> On October 20, 2000, AT&T filed a timely petition for arbitration with the VSCC, a copy of which is attached hereto. AT&T requested the VSCC to issue promptly an order stating either that it would conduct the arbitration pursuant to federal law (and state law to the extent not inconsistent with federal law), or that it declines to conduct an arbitration pursuant to federal law. AT&T’s petition advises the VSCC that it will not accept an offer by the VSCC to conduct an arbitration that is resolved exclusively under state law. AT&T Petition for Arbitration Before the VSCC (attached hereto), at 2, 9-11.

<sup>6</sup> The TPUC consolidated for hearing in a mega-arbitration separately filed petitions by five CLECs (AT&T, MCI, Teleport, MFS and American Communications Services) for arbitration with SWBT under the Act. Petition of AT&T Communications of the Southwest, Inc., Docket No. 16226, Order No. 2 (Aug 15, 1996). The ultimate arbitration award dealt separately with issues raised by individual CLECs, and jointly with issues affecting all or multiple CLECs.

(footnote continued on following page)

AT&T and similarly situated CLECs would have equivalent rights to participate in briefing and hearings, and then in forming interconnection agreements with Verizon based on the resolutions arrived at through the arbitration. This would also allow the Commission to conserve resources, at least to the extent that CLECs have common issues with Verizon.<sup>7</sup>

With respect to timing, AT&T joins WorldCom in urging the Commission to make every effort to complete the arbitration proceeding as promptly as possible, and ideally within the time frames mandated for state commissions by the Act. Local competition simply cannot take root unless and until the relevant disputes with Verizon have been resolved, and interconnection agreements have been approved. However, as the Commission has held, and as WorldCom does not appear to dispute,

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(footnote continued from previous page)

More recently, the Texas Commission initiated Docket No. 21982, a mega-arbitration to handle reciprocal compensation issues on an industry basis as the initial interconnection agreements between SWBT and multiple CLECs expired and were renegotiated. Each CLEC that filed an arbitration request prior to a specified deadline was made party to a single docket which resulted in a single arbitration award applicable to all parties. Docket No. 21982, Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996, Order No. 3. The generic interconnection language resulting from that award will be incorporated into the individual agreements of the respective parties with SWBT.

<sup>7</sup> In the Mega-Arbitrations, all CLECs who negotiated with SWBT and filed petitions for arbitration were granted party status, and were urged by the TPUC to work to present their cases together to the maximum extent possible.

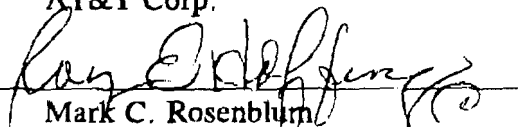
the Act's time frames to which WorldCom analogizes do not apply to the Commission.<sup>8</sup>

AT&T nevertheless urges the Commission to undertake to act as expeditiously as possible, considering the issues that will be before it.<sup>9</sup>

Respectfully submitted,

AT&T Corp.

By:

  
Mark C. Rosenblum  
Roy E. Hoffinger

295 North Maple Avenue, Room 1133M1  
Basking Ridge, NJ 07920  
908/221-2631

Its Attorneys

Date: November 13, 2000

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<sup>8</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15,499 (1996), para. 1291.

<sup>9</sup> WorldCom (pp. 13-14) also urges the Commission "to decide at the outset whether the existing agreement between WorldCom and Bell Atlantic will serve as the starting point for the arbitration." Although AT&T agrees that the most sensible course would be to start with an agreement that already exists and modify it to the extent necessary to conform it to changes in business plans and law, it expresses no opinion whether the Commission need reach that issue in its preemption order.

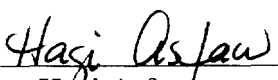


# CERTIFICATE OF SERVICE

I, Hagi Asfaw, hereby certify that on this 13<sup>th</sup> day of November, 2000, I caused a true copy of the foregoing "Comments of AT&T Corp." to be served hand delivery, on the following parties:

Matthew B. Pachman  
Mark B. Ehrlich  
WorldCom, Inc.  
1133 19<sup>th</sup> Street, N.W.  
Washington, DC 20036

Lisa B. Smith  
Kecia B. Lewis  
Dennis Guard  
WorldCom, Inc.  
1801 Pennsylvania Ave., NW  
Washington, DC 20006

  
\_\_\_\_\_  
Hagi Asfaw

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**COMMONWEALTH OF VIRGINIA**

**STATE CORPORATION COMMISSION**

**AT RICHMOND, NOVEMBER 1, 2000**

**PETITION OF**

**COX VIRGINIA TELCOM, INC.,  
Requesting Party,**

**CASE NO. PUC000212**

**v.**

**VERIZON VIRGINIA INC. f/k/a  
BELL ATLANTIC-VIRGINIA INC.,  
Responding Party**

For declaratory judgment and  
conditional petition for arbitration  
of unresolved issues by the State  
Corporation Commission pursuant to  
Section 252 of the Telecommunications  
Act of 1996 or alternative petition  
for dismissal

**ORDER OF DISMISSAL**

On July 27, 2000, Cox Virginia Telcom, Inc. ("Cox"), filed its Petition for Declaratory Judgment and Conditional Petition for Arbitration or Alternative Petition for Dismissal ("Petition"). The Petition first requests the Commission to issue a declaratory judgment that the requested arbitration of interconnection terms and conditions between Cox and Verizon Virginia Inc. f/k/a Bell Atlantic-Virginia Inc. ("Verizon Virginia"), proposed conditionally by Cox, shall be conducted by this Commission pursuant to Section 252 of the Telecommunications Act of 1996, 47 U.S.C. § 151, et seq. ("the

Act"). If the Commission should not grant the declaratory judgment sought, then Cox requests that its Petition be dismissed.<sup>1</sup>

Verizon Virginia, by counsel, filed a letter in response to the Cox Petition on August 16, 2000, averring that it was under no duty to respond in conformance with the requirements of Section 252(b)(3) of the Act because the Petition conditionally requested this Commission to arbitrate an interconnection agreement under the Act. Verizon Virginia maintains that the Act does not speak to conditional petitions, and that as the non-petitioning utility, Verizon Virginia is under no duty to file a response to Cox's conditional petition to arbitrate.

Cox filed comments on September 11, 2000, responding to Verizon Virginia's letter filed August 16, 2000. Cox points out in its comments that Verizon Virginia has filed no objection to the judgment sought by Cox declaring that the Commission proceed under the Act to arbitrate the interconnection agreement between Cox and Verizon Virginia. Cox also alleges in its comments that Verizon Virginia has failed to comply with our rules implementing Section 252 of the Act, 20 VAC 5-400-190 C 2.

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<sup>1</sup> Cox seeks an express statement in the dismissal by this Commission "that it will neither take action on Cox's Conditional Petition for Arbitration nor act to carry out the responsibilities of State commissions under 47 U.S.C. § 252, so that the Federal Communications Commission ("FCC") might take jurisdiction over this arbitration pursuant to 47 U.S.C. § 252(e)(5). . . .".

The Commission finds that it cannot rule on the declaratory relief sought by Cox as such ruling might be considered an exercise of jurisdiction under the Act and, therefore, a waiver of the Commonwealth's sovereign immunity. We recognize that the attention drawn by Cox (i.e., its petition for declaratory judgment) to this jurisdictional matter is simply to anticipate being given the same choice offered to Cavalier Telephone, LLC, by our Order of June 15, 2000, in Case No. PUC990191. There, we allowed Cavalier either to pursue the resolution of interconnection issues under state law or to take its petition for arbitration under the Act to the Federal Communications Commission ("FCC").

As discussed in our Order of June 15, 2000, in Case No. PUC990191,<sup>2</sup> the Commission has authority under state law to order interconnection between carriers operating within the Commonwealth, and § 56-38 of the Code of Virginia authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons." Further, our rules codified at 20 VAC 5-400-180 as "Rules Governing the Offering of Competitive Local Exchange Telephone Service" anticipate that we would address

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<sup>2</sup> Petition of Cavalier Telephone, LLC, For arbitration of interconnection rates, terms and conditions, and related relief, Document Control Center No. 000630199.

interconnection issues under the authority of the Virginia Code. Rules 20 VAC 5-400-180 F 5 and 6 specifically provide for our "arbitration" of contested matters. We stand ready to arbitrate this matter pursuant to these state authorities should Cox so request.

However, as evidenced by its Petition, Cox prefers to proceed with its arbitration of unresolved issues with Verizon before the FCC under the Act rather than before this Commission pursuant to 20 VAC 5-400-180 F 6 and other state authority. Cox has requested dismissal of its Petition in the event that this Commission does not proceed under the Act. We note that under present controlling federal authority,<sup>3</sup> any action taken by us pursuant to 252(b) of the Act effects a waiver of the sovereign immunity of the Commonwealth. We previously have found no authority, and the parties here have suggested none, that would empower us to waive the Commonwealth's constitutional immunity from suit under the Eleventh Amendment to the U.S. Constitution. Until the issue of Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States,<sup>4</sup> we will not act solely under the Act's federally

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<sup>3</sup> See GTE South Inc. v. Morrison, 957 F. Supp. 800 (1997); GTE South Inc. v. Morrison, 6 F. Supp. 2d 517, aff'd., 199 F. 3d 733 (4th Cir. 1999); AT&T of Virginia v. Bell Atlantic-Virginia, Inc., 197 F. 3d 663 (4th Cir. 1999).

<sup>4</sup> The 4th Circuit currently has pending before it a case involving sovereign immunity, BellSouth Telecommunications, Inc. v. North Carolina Utilities

conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers.

Therefore, we will grant Cox's alternative request to dismiss this Petition so that it may proceed before the FCC. If Cox does proceed to the FCC, it shall be the responsibility of Cox to serve copies of all pleadings filed herein upon the FCC.

Accordingly, IT IS ORDERED THAT:

(1) This case is hereby dismissed pursuant to the laws of the Commonwealth of Virginia, without prejudice, consistent with the findings above. This Commission will not arbitrate the interconnection issues under federal law for the reasons given above.

(2) There being nothing further to come before the Commission this case is closed.

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Commission, No. 99-1845(1), which was argued May 1, 2000. As of the date of this Order, the 4th Circuit has not ruled on this matter.

## STATE CORPORATION COMMISSION

000910288

AT RICHMOND, SEPTEMBER 13, 2000

PETITION OF

MCIMETRO ACCESS TRANSMISSION  
SERVICES OF VIRGINIA, INC.

and

CASE NO. PUC000225

MCI WORLDCOM COMMUNICATIONS  
OF VIRGINIA, INC.

For Arbitration Pursuant to  
Section 252(b) of the  
Telecommunications Act of 1996  
to Establish an Interconnection  
Agreement with Bell Atlantic-  
Virginia, Inc.

2000 SEP 13 A 11:07

ORDER

On August 10, 2000, MCImetro Access Transmission Services of Virginia, Inc., and MCI WORLDCOM Communications of Virginia, Inc., (collectively, "WorldCom"), filed a petition with the State Corporation Commission ("Commission") to arbitrate unresolved issues to enable WorldCom to enter into interconnection agreements to replace its existing interconnection agreements with Bell Atlantic-Virginia, Inc., pursuant to § 252(b) of the Telecommunications Act of 1996 and 20 VAC 5-400-190. On September 5, 2000, Verizon Virginia Inc. f/k/a Bell Atlantic-Virginia, Inc. ("Verizon"), filed a motion to dismiss WorldCom's arbitration petition.

Until the issue of Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United

States,<sup>1</sup> we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers. For this reason, we will take no action on Verizon's motion to dismiss WorldCom's petition.

As discussed in our Order of June 15, 2000, in Case No. PUC990191,<sup>2</sup> the Commission has authority under state law to order interconnection between carriers operating within the Commonwealth, and § 56-38 of the Code of Virginia authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons." Further, our rules codified at 20 VAC 5-400-180 as "Rules governing the offering of competitive local exchange telephone service" anticipate that we would address interconnection issues under the authority of the Virginia Code.

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<sup>1</sup> The Commission recently joined a friend of the Court brief prepared by the Pennsylvania Public Utilities Commission urging the United States Supreme Court to grant certiorari in Strand et al. v. Michigan Bell Telephone Co., No. 99-1878, filed July 24, 2000, a decision of the 6<sup>th</sup> Circuit permitting suit against the Michigan public utility commissioners under a different legal theory. Also, the 4<sup>th</sup> Circuit currently has pending before it a case involving sovereign immunity, BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission, No. 99-1845(L), which was argued May 1, 2000. As of the date of this Order, neither the Supreme Court nor the 4<sup>th</sup> Circuit has ruled on these matters.

<sup>2</sup> Petition of Cavalier Telephone, LLC, For arbitration of interconnection rates, terms and conditions, and related relief, Document Control Center No. 000630199.



Rules 20 VAC 5-400-180 F 5 and 6 specifically provide for our "arbitration" of contested matters.

The parties may elect to proceed with WorldCom's arbitration under the Act before the Federal Communications Commission ("FCC") in lieu of this Commission, or the parties may pursue resolution of unresolved issues pursuant to 20 VAC 5-400-180 F 6. If WorldCom wishes to pursue this matter before the Commission, the proceeding before us will be deemed to be requesting our action only under authority of Virginia law and our Rules.

Accordingly, IT IS ORDERED THAT:

(1) WorldCom shall, within fifteen (15) days of the date of this Order, advise us in writing whether it wishes to pursue its arbitration request before us, consistent with the findings above.

(2) This case is continued for further orders of the Commission.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Eric M. Page, Esquire, and Robert A. Omberg, Esquire, LeClair Ryan, P.C., 4201 Dominion Boulevard, Suite 200, Glen Allen, Virginia 23060; Vishwa B. Link, Esquire, MCI WorldCom, Inc., 1133 19th Street, N.W., Washington, D.C. 20036; Lydia R. Pulley, Vice President, General Counsel and Secretary, Verizon Virginia Inc., 600 East Main Street, Suite 1100,

Richmond, Virginia 23219-2441; John F. Dudley, Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; and the Commission's Divisions of Communications, Public Utility Accounting, and Economics and Finance.

A True Copy  
Test:  
J. F. Dudley  
Clerk of the  
State Corporation Commission

## STATE CORPORATION COMMISSION

000830331

AT RICHMOND, AUGUST 22, 2000

PETITION OF

2000 AUG 22 P 4:00

FOCAL COMMUNICATIONS CORPORATION  
OF VIRGINIA

CASE NO. PUC000079

For arbitration pursuant to  
Section 252(b) of the  
Telecommunications Act of 1996  
to establish an interconnection  
agreement with Verizon Virginia  
Inc. f/k/a Bell Atlantic -  
Virginia, Inc.

FINAL ORDER

Pursuant to § 252(b) of the Telecommunications Act of 1996 ("the Act"), Focal Communications Corporation of Virginia ("Focal") filed with the Commission on March 31, 2000, a Petition For Arbitration ("Petition") to establish an interconnection agreement with Verizon Virginia Inc. f/k/a Bell Atlantic - Virginia, Inc. ("Verizon"). The Commission issued an Order on July 19, 2000, which determined that the Petition would be considered under 20 VAC 5-400-180 F, the Commission's Rules Governing the Offering of Competitive Local Exchange Telephone Service. The purpose of invoking this rule was to avoid constructive waiver of immunity from federal appeal under the Act, pursuant to the Eleventh Amendment to the Constitution of the United States.<sup>1</sup>

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<sup>1</sup> Our Order issued June 15, 2000, in Case No. PUC990191 states the reasons for declining to exercise full jurisdiction under the Act.

Our July 19, 2000, Order therefore amended our April 14, 2000, Order for Response, which had required Verizon to respond to the unresolved issues in the Petition to reflect consideration of Focal's Petition under 20 VAC 5-400-180 F 6, rather than under 20 VAC 5-400-190, the Commission's Rules for Implementing §§ 251 and 252 of the Act. Focal was required to indicate to the Commission whether it wished to proceed with arbitration under the Act before the Federal Communications Commission ("FCC") in lieu of the Commission, or to present any remaining unresolved issues to the Commission pursuant to 20 VAC 5-400-180 F 6.

On August 3, 2000, Focal filed a Statement of Intention advising the Commission that it declined to pursue arbitration with Verizon pursuant to the framework outlined in our July 19, 2000, Order. Focal further advised the Commission that, as a separate matter, it would be notifying Verizon of its intention to adopt a different interconnection agreement already negotiated between Verizon and another party pursuant to § 252(i) of the Act.

Accordingly, IT IS ORDERED THAT there being nothing further to come before the Commission, this case shall be dismissed, and all papers filed herein shall be placed in the file for ended causes.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Michael L. Shor, Esquire, Swidler Berlin Shereff Friedman, LLP, 3000 K Street, N.W., Suite 300, Washington, D.C. 20007; Jane Van Duzer, Senior Counsel, Regulatory, Focal Communications Corporation of Illinois, 200 North LaSalle Street, Suite 1100, Chicago, Illinois 60601; Lydia R. Pulley, Esquire, Verizon Virginia, Inc., 600 East Main Street, 11th Floor, Richmond, Virginia 23219; John F. Dudley, Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main St., 2<sup>nd</sup> Floor, Richmond, Virginia 23219; and the Commission's Office of General Counsel and Division of Communications.

A True Copy  
Teste: *Joel H. Leck*  
Clerk of the  
State Corporation Commission

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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JUNE 15, 2000

PETITION OF

CAVALIER TELEPHONE, LLC

CASE NO. PUC990191

For arbitration of interconnection  
rates, terms and conditions, and  
related relief

ORDER

On October 18, 1999, Cavalier Telephone, LLC ("Cavalier"), filed a pleading that contained both an informal complaint against Bell Atlantic-Virginia, Inc. ("BA-VA"), and a request that the Commission arbitrate the rates, terms, and conditions for interconnection and related arrangements concerning a proposed amendment to the parties' interconnection agreement, which we had approved by Order entered June 21, 1999, in Case No. PUC980048. Cavalier petitioned to convert the informal complaint to formal status on January 5, 2000. Pursuant to our Order Initiating Formal Proceeding in the above-captioned case, issued February 11, 2000, we referred portions of this matter to the Hearing Examiner and ordered the parties to brief certain jurisdictional issue questions, including:

1. Is the jurisdiction over this complaint properly before this Commission, the FCC, or a state or federal court of general jurisdiction?
2. If jurisdiction over the complaint properly lies with this Commission, what remedies are available to us?

3. Is there a basis in Virginia law for the Commission to assert or exercise jurisdiction over the request for the Commission to arbitrate unresolved issues between the parties that is independent of any authority contained in the Act?

4. Should the Commission establish a generic case to establish BA-VA's prices for DSL loops as an unbundled network element and is there a basis to do so under state law?

We directed the Hearing Examiner to review the pleadings and briefs and report his recommendations. The Commission also withheld action on Cavalier's concurrently filed request for arbitration and BA-VA's motion to dismiss that request. Hearing Examiner Howard P. Anderson, Jr. filed his Report on April 14, 2000. Cavalier and BA-VA filed comments to the Report on May 5, 2000. The Examiner found:

1. The Commission has jurisdiction to hear Cavalier's complaint.

2. The remedies available to the Commission in this matter include the powers of injunction and mandamus, but not the authority to award damages.

3. Virginia law provides a basis, separate and apart from authority contained in the federal Telecommunications Act of 1996, 47 U.S.C. 151, et seq. (the "Act"), for the Commission to assert or exercise jurisdiction over Cavalier's petition for arbitration of interconnection terms and conditions.

4. The Commission should establish a generic investigative docket to establish prices for BA-VA's provision of digital subscriber line loops ("DSL") as an unbundled network element to competitive local exchange carriers.

NOW THE COMMISSION, upon consideration of the Report, the comments thereon, and the record herein, concludes as discussed more fully below that we should adopt the first three of the Examiner's findings and recommendations. We find no need to establish a generic pricing docket for DSL loops. Under the procedures we will set out in this Order, we will establish the prices for this network element pursuant to the authority conveyed to us under the Constitution of Virginia and Code of Virginia and such authority conveyed by the Act that we may lawfully exercise.

Alternatively, Cavalier may elect to withdraw its request for our arbitration of these matters and instead petition the Federal Communications Commission ("FCC") to undertake to establish such prices solely under the authority of the Act. Any prices we establish for DSL loops will be available to any CLEC wishing to obtain this element from BA-VA. Finally, Cavalier may continue to prosecute its complaint here or avail itself of the concurrent jurisdiction of the courts of general jurisdiction in the Commonwealth with regard to the issues raised in that portion of its pleading.

Consistent with these findings, we will now deny BA-VA's Motion to Dismiss and Motion for More Definite Statement. We direct Cavalier to advise us in writing, within 15 days of the date of this Order, whether it will continue either of these matters before us.

We have concluded that there is substantial doubt whether we can take action in this matter solely pursuant to the Act, given



that we have been advised by the United States District Court for the Eastern District of Virginia that our participation in the federal regulatory scheme constructed by the Act, with regard to the arbitration of interconnection agreements, effects a waiver of the sovereign immunity of the Commonwealth. It is axiomatic that the Commission has no inherent power simply because it was created by the Constitution of Virginia. Its jurisdiction must be found either in constitutional grants or in statutes that do not contravene the Constitution.<sup>1</sup> No statute or constitutional grant authorizes us to subject the Commonwealth to federal suit by waiving its sovereign immunity.

We have examined the Virginia Code and our previously promulgated rules, however, and find that they provide sufficient authority necessary for us to render a decision on the pending request for arbitration.

#### Jurisdiction to Hear Complaint

As found by the Examiner, we conclude that Virginia law provides ample authority for the Commission to exercise jurisdiction over Cavalier's complaint. We further find that our authority, in this matter, is concurrent with that of the courts of common jurisdiction within the Commonwealth. Article IX of the Constitution of Virginia establishes our general authority over the rates and services of public service companies. Section 56-35 of the Code of Virginia grants us the power, and charges us with the duty, of "supervising, regulating and

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<sup>1</sup> City of Norfolk v. Virginia Electric and Power Company, 197 Va. 505; 90 S.E.2d 140 (1955).

controlling all public service companies doing business in this Commonwealth, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies." Both Cavalier and BA-VA are public service companies and subject to our authority in these regards.

Section 56-6 of the Code provides that any person or corporation aggrieved by actions or omissions of a public service company of any of their obligations imposed by the Code "shall have the right to make complaint of the grievance and seek relief by petition against such public service corporation before the State Corporation Commission . . . ." Chapter 15 of Title 56 of the Code of Virginia extensively sets out our authority over telephone companies operating within the Commonwealth, including the right to require interconnection between carriers.

Section 56-6 provides that upon hearing a complaint the Commission "shall have jurisdiction, by injunction, to restrain such public service corporation from continuing [its breach of the law] and to enjoin obedience to the requirements of this law . . . ." Further, the Commission may "by mandamus, . . . compel any public service corporation to observe and perform any public duty imposed upon public service corporations by the laws of this Commonwealth . . . ." Other provisions of the Code permit the imposition of fines for specified violations. However, we find no jurisdiction to award damages that Cavalier seeks in its

complaint.<sup>2</sup> Therefore, should Cavalier decide to maintain its complaint action against BA-VA before us, the remedies available to it under the Code of Virginia are injunctive and prospective in nature. We have no authority to award damages to Cavalier should we find its complaint to be well-founded.

#### Jurisdiction over Arbitration Request

Turning to the matter of the request for arbitration, we also find authority under state law that provides for our intercession. Section 56-479 of the Code of Virginia empowers us to order interconnection between carriers operating within the Commonwealth, and § 56-38 authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons." In this instance, Cavalier would be a patron of BA-VA as Cavalier seeks to obtain services and use of BA-VA's facilities in order to provide DSL services to its own patrons.

In addition to the authority quoted above, the Commission promulgated regulations prior to the passage of the Act to implement the revisions to § 56-265.4:4 C 3 of the Code of Virginia that allowed us to certificate competing local exchange carriers. In Case No. PUC950018,<sup>3</sup> we adopted rules, now codified at 20 VAC 5-400-180 as "Rules governing the offering of

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<sup>2</sup> Section 207 of the Federal Communications Act of 1934 provides that damages may be recovered in complaint to the FCC. The Code of Virginia contains no analogous provisions allowing the Commission to award damages.

<sup>3</sup> Ex Parte: In the matter of investigating local exchange telephone competition, including adopting rules pursuant to Virginia Code § 56-265.4:4.C.3, Case No. PUC950018, 1995 S.C.C. Ann. Rep. 249.

competitive local exchange telephone service," ("Rules") in anticipation that we would address issues such as this under the authority of the Virginia Code. Rules 20 VAC 5-400-180(F) (5) and (6) specifically provide for our "arbitration" of contested matters.

Shortly after the issuance of the Rules, the federal Act was passed and we promulgated additional rules to implement the procedures established by that measure. Following the Commission's arbitration of certain earlier interconnection agreements submitted under §§ 251 and 252 of the Act pursuant to these later-enacted rules, our orders approving these agreements were reviewed on federal appeal as explicitly provided by § 252(e) (6) of the Act<sup>4</sup>. What is not made explicit in the Act (nor do we consider legally inferred therefrom), however, is that the Commonwealth of Virginia, in the person of the Commissioners acting in their official capacity, would also be a party to this federal review. The Commission had maintained and continues to maintain that in taking its actions on these agreements the Commonwealth of Virginia is protected from federal suit by the Eleventh Amendment to the U.S. Constitution.

The Commission did not consider its participation in the Act's regulatory scheme to constitute a waiver of immunity under the Eleventh Amendment. The Commission has no authority to waive the Commonwealth's sovereign immunity. Therefore, we will not

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<sup>4</sup> See MCI Telecomm. Corp. v. Bell Atlantic-Virginia, Inc., 1997 WL 1133714 (E.D. Va.); GTE South Inc. v. Morrison, 957 F. Supp. 800 (1997); GTE South Inc. v. Morrison, 6 F. Supp.2d 517, *aff'd*, 199 F.3d 733 (4th Cir. 1999); AT&T of Virginia v. Bell Atlantic-Virginia, Inc., 197 F.3d 663 (4th Cir. 1999)

take any action in this matter that may subject the Commonwealth to federal suit. As noted above, we find clear and pertinent authority under Virginia law, and our Rules, to permit our resolution of the arbitration dispute, and any order we enter with regard to this portion of Cavalier's pleading will be taken accordingly. Thus, any party aggrieved by our action in resolving these issues would have an appeal of right to the Virginia Supreme Court. The extent to which our actions are or may be concurrently authorized by the Act should be viewed as coincidental in this respect. Any party that proceeds before us shall be deemed to be requesting our action under color of the authority we are unquestionably delegated to wield – that of the Commonwealth of Virginia, and all such other authority we may lawfully exercise without waiving the Commonwealth's immunity.

Until the issue of Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States,<sup>5</sup> we have concluded no longer to act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the

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<sup>5</sup> In at least one of the federal appellate circuits, the Fifth, the doctrine of waiver of sovereign immunity has apparently been extinguished. See, AT&T Communications Commission of South Central States v. BellSouth Telecommunications, Inc., 43 F. Supp.2d 593 (M.D. La. 1999). We have also recently joined a friend of the Court brief prepared by the Pennsylvania Public Utilities Commission urging the United States Supreme Court to grant certiorari in Strand et al. v. Michigan Bell Telephone Co., No. 99-1878, filed June 15, 2000, a decision of the 6th Circuit permitting suit against the Michigan public utility commissioners under a different legal theory. The 4th Circuit also appears poised to address the sovereign immunity issue in BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission, No. 99-1845(L), which was argued May 1, 2000. The Court has requested supplemental briefs from the parties on the question whether the North Carolina Utilities Commission is an indispensable party to any federal review action pursuant to the Act.

arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers. We do find, though, that we possess authority under Virginia law for us to continue to resolve such issues.

Accordingly, IT IS ORDERED THAT:

(1) The Commission will, upon receipt of the notification required by Paragraph No. 4, infra, consider Cavalier's complaint pursuant to the Rules set out in 20 VAC 5-400-180, other pertinent state statutes and rules, and under such authority we can lawfully exercise pursuant to the Act.

(2) Pursuant to Rule 7:1 of our Rules of Practice and Procedure, the Commission hereby appoints a Hearing Examiner to conduct all further proceedings necessary to establish an interconnection agreement between the parties, consistent with the findings above.

(3) BA-VA's Motion To Dismiss and Motion For More Definite Statement are hereby denied.

(4) Cavalier shall, within fifteen (15) days of the date of this Order, advise us in writing whether it wishes to continue these matters before us, consistent with the findings above.

(5) This case is continued for further orders of the Commission.

DOCUMENT OFF-LINE

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